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No. 97-632

In The
Supreme Court of the United States
October Term, 1997

FRANCIS E. DADDARIO,

Petitioner,

vs.

CAPE COD COMMISSION,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF THE PETITIONER

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November 10, 1997

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF THE PETITIONER

Defenders of Property Rights (Defenders), moves this Court pursuant to Rule 21.2(b) of the Rules of this Court for leave to file the attached brief *amicus curiae* to present arguments stating why the Petitioner's petition for a writ of certiorari should be granted. This case raises significant issues regarding the interpretation of the Just Compensation Clause of the Fifth Amendment. Specifically, the Cape Cod

Commission has denied the Petitioner a permit to mine loam, sand and gravel from his property. This permit denial has the effect of drastically reducing Petitioner's ability to make beneficial and productive use of his land and reducing its value by approximately eighty percent.

Defenders' mission is to protect vigorously constitutionally protected property rights. Defenders of Property Rights has participated in every case before this Court involving property rights since its founding in 1991: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 714 (1995); *Bennett v. Spear*, No. 95-813, Slip op. (S. Ct. March 19, 1997); *Suitum v. Tahoe Regional Planning Agency*, No. 96-243, Slip op. (S. Ct. May 27, 1997); and, *Boerne v. Flores*, No. 95-2074, Slip op. (S. Ct. June 25, 1997). Defenders has also devoted a significant portion of its resources to the litigation of regulatory taking issues across the country on behalf of its members and property owners whose rights have been infringed in violation of the Fifth Amendment. Thus, Defenders believes

that its participation in this case will assist the Court in better understanding and resolving the important constitutional issues at stake in this case.

Counsel for the Petitioner has consented to the filing of the attached brief *amicus curiae* and a letter from Counsel for Petitioner granting consent has been filed with the Clerk of the Court simultaneously with this motion. Counsel for Respondent has refused to consent to the filing of the attached brief *amicus curiae* thereby necessitating the filing of this motion.

For the foregoing reasons, Defenders respectfully requests that this Court grant this motion for leave to file the attached brief *amicus curiae*.

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BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether the *per se* just compensation requirement announced by this Court in *Lucas* applies to government actions that result in a loss of substantially all but not the total loss of the beneficial and productive use of private property?

Whether courts in an inverse condemnation action may analyze the loss of substantially all beneficial and productive use of the specific property affected by the government action at issue in the case?

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Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae* submits this brief in support of the Petitioner.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Fifth Amendment's Just Compensation Clause worthless. Defenders' mission is to vigorously protect those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and other individual rights such as religious liberty. Defenders devotes a significant portion of its resources to litigation and has participated in *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, *Babbitt v. Sweet Home Chapter Communities for a*

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[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* (its members or counsel) contributed financially to the preparation of this brief.

Great Oregon, Bennett v. Spear, Suitum v. Tahoe Regional Planning Agency and *Boerne v. Flores* when they were before this Court.

STATEMENT OF THE CASE

At issue in this case are unresolved questions resulting from this Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the Court held that when "a regulation that declares 'off-limits' all economically productive or beneficial use of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Id.* at 1030.

Lower courts, however, have differed greatly in their interpretation of *Lucas*. For example, one important issue dividing lower courts is what "property" is used to measure the extent to which economic and beneficial use is denied: the specific property interest being regulated, or the owner's entire range of interests in that property. Some courts have gone so far as to hold that a property owner must lose all beneficial and productive use of all of a given property, not just the specific parcel or interest being regulated, before compensation is required. *See, e.g., Florida Game and Fresh*

Water Fish Comm'n v. Flotilla Inc., 636 So. 2d 761, 765 (Fla. Dist. Ct. App. 1994)("Because the property as a whole retained an economic life, we cannot agree that the land use restrictions are compensable.").

Other courts, however, have adopted a different approach to this problem. The United States Court of Appeals for the Federal Circuit has held that, where a large amount of property had been developed over time, that the "takings" analysis need only include the specific property subject to the permit denial being challenged to determine whether all beneficial and productive use had been denied to the property owner. *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

Courts have also grappled with the question of whether the reasoning in *Lucas* also applies to cases where government regulations have eliminated less than all beneficial and productive use of private property even if that loss is substantial, as it is in this case. Some courts have held that the *Lucas* analysis cannot be applied to these "partial takings." *See, e.g., Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377 (N.J. 1992)(held that a

regulation does not effect a taking unless it denies all practical use of property or substantially destroys beneficial use).

In the *Florida Rock* case, however, the Federal Circuit questioned this narrow and harsh application of *Lucas*:

> Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994).

These unresolved issues are of crucial importance to property owners across the country. Since lower courts have been unable to adopt a uniform approach to these problems, guidance from this Court is necessary to resolve these important constitutional issues.

SUMMARY OF ARGUMENT

The facts of this case raise issues relating to the requirements for a *per se* violation of the Just Compensation Clause left unresolved by this Court in *Lucas v. South*

Carolina Coastal Council, 505 U.S. 1003 (1992). Accordingly, this case presents an important opportunity for this Court to clarify its holding in *Lucas*.

This case concerns the denial by Respondent of Petitioner's application for a permit to extract loam, sand, and gravel from his property. Petitioner's property is an approximately seventy acre parcel located in the Town of Falmouth, Massachusetts. At trial, expert testimony indicated that Respondent's permit denial had reduced the value of Petitioner's property by at least seventy-eight percent. After Respondent's permit denial, Petitioner filed the instant lawsuit in state court, asserting claims that his property was taken without payment of just compensation in violation of the United States and Massachusetts Constitutions. While the trial court held that Petitioner was entitled to just compensation for Respondent's permit denial, upon appeal the court below held that the Respondent's actions did not rise to the level of an unconstitutional taking entitling Petitioner to payment of just compensation.

Of particular importance to the issues before this Court are two reasons given by the court below for its

holding. First, the court below found that there was substantial beneficial and productive use left in Petitioner's property because Petitioner's rights in the surface estate of his property had to be considered in the takings analysis. In reality, however, the permit denial only affected, and in fact completely eliminated, Petitioner's rights in the mineral estate on his property—a separate and distinct property interest recognized under Massachusetts law.

This finding by the court below is squarely at odds with the holdings of other courts, including the United States Court of Appeals for the Federal Circuit, which has held that the takings analysis can involve only the property interest that is the subject of the regulation being challenged. *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). Indeed, this Court has never provided an across-the-board rule for addressing what property interests constitute the "denominator" to determine what fraction of the beneficial and productive use of property has been eliminated by government action. This is an extremely important issue in "takings" litigation that literally affects every claim for

inverse condemnation brought under the Just Compensation Clause of the Fifth Amendment.

The court below also found that this remaining "substantial" beneficial and productive use of Petitioner's property precluded the trial court from awarding just compensation to the Petitioner, even though, as previously indicated, Petitioner's property had lost at least seventy-eight percent of its fair value. Pet. App. at 9a. The theory advanced by the court below for this finding was that the possibility of remaining beneficial and productive use was sufficient to defeat a takings claim. Pet. App. at 10a. The court below, citing this Court's opinion in *Lucas*, reached this result by relying on the *ad hoc* balancing test previously advanced by this Court in *Penn Central Transportation. Co. v. New York City*. Pet. App. at 7a. Essentially, the court below construed *Lucas* to mean that *only* a denial of all beneficial and productive use satisfies the *per se* takings analysis.

This Court, however, explicitly limited its holding in *Lucas* to the particular facts of that case. *Lucas* involved a situation where there was unquestionably little or no

remaining beneficial and productive use of the subject property in that case. *Lucas*, 505 U.S. at 1020. In holding that this factual situation constituted an unconstitutional taking *per se*, this Court pointedly refused to hold that the category of *per se* takings is limited solely to those situations where substantially all beneficial and productive use of property has been precluded. *Id.* at 1019 n.8.

The issues and facts raised by the present case provide the Court with an opportunity to clarify whether the holding in *Lucas* also applies to those situations involving substantial, but not total, elimination of beneficial and productive use of property.

REASONS WHY THE PETITION SHOULD BE GRANTED

This Court's opinion in *Lucas v. South Carolina Coastal Council* stands as a landmark in Fifth Amendment jurisprudence. The Court has, in effect, lifted a whole class of cases out of the difficult *ad hoc* balancing test previously employed by this Court in regulatory takings cases. *See Penn Central Transportation Co. v. New York*, 438 U.S. 104

(1978). Despite the seminal importance of *Lucas*, however, there are at least two major issues regarding "*per se*" takings arising out of *Lucas* that have not yet been addressed by this Court. These issues are the extent of the property interests to be considered in the takings analysis and to what extent the *per se* takings analysis applies to government regulations that substantially reduce, but do not entirely eliminate, the beneficial and productive use of private property.

I. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY WHETHER THE SPECIFIC PROPERTY INTEREST SUBJECT TO THE REGULATION AT ISSUE IN A CLAIM FOR JUST COMPENSATION MAY BE USED AS THE BASIS FOR THE TAKINGS ANALYSIS.

In the present case, Petitioner was applying to Respondent for permission to utilize the mineral estate on his property by extracting loam, sand and gravel. Pet. App. at 3a-4a. The mineral estate has long been recognized as a separate and distinct property interest from the surface estate under Massachusetts law. *Gray v. Handy*, 208 N.E.2d 829 (Mass. 1965). Thus, the true impact of the Respondent's permit denial, total elimination of the use of the Petitioner's mineral estate, was avoided by the court below by treating

the whole parcel, including use of the surface estate, owned by Petitioner as the "subject property" of this takings action.

In *Lucas*, this Court indicated that it did not have an opportunity to address this issue:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. . . . we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7(1992).

The present lack of guidance from this court on the "measuring interest" issue has created conflict and uncertainty in the lower courts. The holding of the court below regarding the property interest to be utilized in the takings analysis is squarely in conflict with other courts, including the United States Court of Federal Claims, as evidenced by that court's opinion in *Whitney Benefits v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*,

112 S. Ct. 406 (1992). In *Whitney Benefits*, plaintiffs had entered into a leasing agreement to extract coal and had incurred other expenses in anticipation of mining. Congress thereafter enacted the Surface Mining Control and Reclamation Act, which required plaintiffs to obtain a mining permit. Plaintiffs' strip mining operation was denied because the planned activity potentially could have disturbed the underground water table that was essential to local farming. The court rejected the government's argument that there was no taking because plaintiffs still could ranch and farm the surface of the land. Plaintiffs were claiming only that mineral rights were taken, and applicable state law recognized the mineral estate as a separate unit of property. There was a *total* deprivation of the value of this mineral estate—without the permit, no coal could be mined and there were no other extractable minerals on the land.

Not only does the reasoning of the court below conflict with *Whitney Benefits*, but many other cases less factually related, as well. For example, in *Loveladies Harbor v. United States*, 28 F.3d 1171 (1994), the Court of Federal Claims limited its focus to the "value of that property which

Claims limited its focus to the "value of that property which plaintiffs held when the taking was said to have occurred." when the government defendant had asked the court to use a much larger parcel that had originally been purchased together with the regulated parcel as the basis for analysis of the takings claim.

Indeed, even prior decisions of this Court appear to conflict with each other concerning this question of Fifth Amendment jurisprudence. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)(focus was on the easement taken, not on the regulation's impact upon the property as a whole) ; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)(focused only upon one-eighth cubic foot of apartment building roof space taken as a result of cable installation regulation). *But see Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978)(holding that ability to transfer development rights to adjacent parcels in common ownership with subject parcel precluded finding of compensable taking).

II. THERE IS CONFUSION IN STATE COURTS AND LOWER FEDERAL COURTS REGARDING THE PERCENTAGE OF LOSS IN VALUE THAT TRIGGERS THE *PER SE* REQUIREMENT FOR JUST COMPENSATION ANNOUNCED BY THIS COURT IN *LUCAS*.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the property owner was unable to secure permission from the government to build two houses on lots which were zoned for single-family residential construction at the time of purchase. The state's passage of the Coastal Zone Management Act effectively operated as a ban on the building of any habitable structure on the property owner's two lots. The trial court held that the ban deprived the property owner of any "reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless" and thus was an unconstitutional taking of property. *Id.* at 1009.

This Court agreed, noting that "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common

good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (emphasis in original).

The *Lucas* opinion, however, did not (and could not) address the issue of whether the *per se* takings rule may be applied to situations in which a subtantial percentage, but not all, of the economically beneficial and productive use of private property had been taken away by government regulations. The facts of *Lucas* did not provide such a situation, so that any opinion by the Court on this issue could possibly have been characterized as dicta.

Indeed, the language of *Lucas* indicates ambiguity as to whether the *per se* takings rule can be applied to partial takings. In addressing Justice Stevens' dissent, the Court states that

> [Justice Stevens'] analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner *might* not be able to claim the benefit of our categorical formulation. . . .

Id. at 1019 n.8 (emphasis supplied).

The decision of the court below in this case and the opinions of other lower courts indicate that further

clarification is needed from this court whether the *per se* takings analysis may be applied to situations where property retains some economically beneficial and productive use in the face of government regulation. Despite the fact that even Respondent's expert appraisal testimony at trial conceded that Petitioner's property had been reduced by seventy-eight percent due to Respondent's permit denial, the court below held that Petitioner's property retained "substantial" use. Pet. App. at 9a. Citing the opinion of the United States Court of Appeals for the Federal Circuit in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), the court below held that the existence of these other potential uses of Petitioner's property precluded Petitioner from successfully asserting his claim for just compensation. Pet. App. at 10a.

In other instances where courts have faced severe reductions (although not total elimination) of market value, however, they have not hesitated to find a taking. In *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), for example, the Army Corps of Engineers denied plaintiffs a permit to fill 12.5 acres of wetlands. Using fair market value, which takes into account the highest and best

use of the land, the United States Claims Court compared the value of the 12.5 acres before and after the Corps' denial of the permit. The highest and best use of the land before the government's action was the construction of a 40-lot residential development, resulting in a fair market value of $2,658,000. Yet, after the Corps' action the land only could support recreation and conservation uses (hunting, bird watching, harvesting salt hay), resulting in a mere fair market value of $12,500. This drastic decline in value, when coupled with the elimination of reasonable future uses, was sufficient for the court to find that a taking had occurred. Other cases have established that government regulations that take away a substantial part, but not all, of the value of private property require payment of just compensation. *See, e.g., Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990)(77% reduction in value of turkey breeding stock due to USDA regulation required payment of just compensation).

The Federal Circuit even more explicitly questioned the limitation of the *per se* rule to total takings in its opinion in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). In holding that a property owner

whose property value had been reduced in value by at approximately sixty percent through federal wetlands regulation could be entitled to just compensation, the court stated that

> Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests. In *Lucas*, the Supreme Court touched upon the question of a partial regulatory taking. . . . but, concluding on the facts before it that the case was one in which the owner was called upon 'to sacrifice all economically beneficial uses in the name of the common good,". . . . the Court found a categorical taking and thus did not have to decide the partial taking question.

Id. at 1568-69 (citations omitted).

In short, the conflict between the lower court's decision in the present case and those of other courts provides an excellent opportunity for this Court to clarify the extent of the categorical takings rule most recently addressed by this Court in *Lucas*.

CONCLUSION

The opinion of the court below in this case creates the unfair and extreme result for Petitioner that the loss of at least

seventy-eight percent of the value of his property from Respondent's permit denial does not entitle Petitioner to just compensation for this loss. This result highlights the confusion and uncertainty surrounding the application of this Court's opinion in *Lucas*. Accordingly, *amicus curiae* hereby respectfully urges this Court to grant the petition for a Writ of Certiorari and resolve these significant constitutional issues.

Respectfully submitted,

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